



DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

*use these 3 first
then fill in*

FILE: B-196216, B-196222 to 224
B-196228 to 234
B-196247 to 250, B-196264

DATE: May 16, 1980

MATTER OF: Dolly Green Marshal, et al. - Retroactive Promotions and Backpay

DIGEST: Sixteen Social Security Administration (SSA) employees were recommended for promotion from GS-12 to GS-13 but were not promoted because of agency freeze on such promotions because of question of validity of GS-13 position classification. Although Assistant Secretary of Labor ruled that SSA had committed unfair labor practice by not conferring with union on freeze, employees are not entitled to retroactive promotions with backpay since SSA has discretion as to time of promotions, Assistant Secretary did not direct retroactive promotions, and mere existence of positions does not entitle employees to higher-grade positions.

Employees →

This action is in response to appeals by 16 employees of the Social Security Administration (SSA), Department of Health, Education, and Welfare, of our Claims Division settlements which denied their *claims of SSA* for retroactive promotions and backpay. The employees have designated the American Federation of Government Employees (AFGE) as their representative in this matter.

Each of the employees worked as a Hearings and Appeals Analyst, GS-12, for the SSA. The employees are members of an AFGE unit which was certified as the exclusive bargaining representative. The unit includes analysts classified as GS-301-9/11/12/13. Commencing in September 1975 the Civil Service Commission (CSC) commenced routine audits of positions within the SSA. In May 1977 a vacancy announcement for an analyst position stated that the position had a promotion potential of at least GS-12. A union representative questioned a management official about that statement since prior to that time the promotion potential of analysts was up to GS-13. The union official was informed that although the classification studies were incomplete, they raised some

~~010389~~
112320

AGC00026
CNG00085
DLG02597

B-196216, B-196222 to 224
B-196228 to 234
B-196247 to 250, B-196264

problems as to the appropriateness of the GS-13 analyst positions. The AFGE filed a pre-complaint charge in July 1977 alleging that the SSA had violated the AFGE-SSA agreement by failing to meet and confer on the preparation of the reclassification study and because the SSA was implementing a moratorium on promotions to the GS-13 analyst level.

On or about July 28, 1977, Mr. Makoff, the SSA Personnel Officer, made a determination not to process any additional analyst promotions from GS-12 to GS-13. The AFGE then filed an unfair labor practice (ULP) complaint under Executive Order (EO) 11491, as amended, against the SSA based on the alleged violations in the pre-complaint charge. On September 7, 1977, the SSA Director, Robert L. Trachtenberg, made a decision to continue the action initiated by Mr. Makoff and promotions of GS-12 analysts to GS-13 were frozen until SSA had exhausted all opportunities for protecting the GS-13 analyst classification.

The ULP charges by the AFGE were upheld by the Assistant Secretary of Labor in Social Security Administration, Bureau of Hearings and Appeals, (A/SLMR No. 1134) September 29, 1978. The Assistant Secretary of Labor ordered the SSA to cease and desist from changing job classifications and imposing promotion moratoriums without first notifying and affording the employees representative the opportunity to meet and confer on the impact and implementation of such decisions. The order also directed certain affirmative actions but did not authorize backpay for the employees.

The employees filed claims for backpay. They alleged that they had been informed when they entered on duty that the GS-13 level was the final step in the career-ladder positions. They contended that once an analyst met the criteria for promotion to GS-13, the SSA was required to promote him. They also alleged that they were performing the same duties as other employees in their agency who were classified at the GS-13 grade level. Finally they asserted that the SSA acted in an

B-196216, B-196222 to 224
B-196228 to 234
B-196247 to 250, B-196264

arbitrary and capricious manner by imposing an illegal, arbitrary, and capricious moratorium on their promotion without just cause. Our Claims Division disallowed the claims on the ground that there was nothing in the ULP determination that limits or qualifies the discretion of the SSA to approve or disapprove promotions or require it to make promotions within any specified time period.

The claimants appeal on the ground that the disallowances were made without addressing any of the claimants' arguments or rebutting their proof. For the reasons stated below we hold that the claimants are not entitled to retroactive promotions with backpay.

In a career-ladder, the classification of a position depends on the grade the incumbent has reached through promotion. Unless an administrative regulation, instruction, or policy states otherwise, a career-ladder promotion is not mandatory. Ivey N. Brown, B-195229, September 14, 1979. In the instant case there is no evidence of any agency policy that employees who meet the qualifications for promotions to GS-13 must be promoted. Therefore, the fact that the claimants were in a career-ladder, by itself, does not entitle them to promotion at any particular time. Cf. Internal Revenue Service Employees, B-183061, July 2, 1975.

The claimants also state that they actually performed the same duties as other employees in their agency who were classified at the GS-13 grade level. Generally, Federal employees are entitled only to the salaries of the positions to which they are appointed regardless of the duties they actually perform. United States v. Testan, 424 U.S. 392 (1976). However, we have held that employees officially detailed to higher positions for more than 120 days, without Civil Service Commission approval, are entitled to retroactive temporary promotions with backpay for the period beginning with the 121st day of the detail until the detail is terminated. Turner-Caldwell, 55 Comp. Gen. 539 (1975) and 56 id. 427 (1977). However, in the present case the

B-196216, B-196222 to 224
B-196228 to 234
B-196247 to 250, B-196264

record does not show that the claimants were ever detailed to the higher-grade positions. Therefore, the Turner-Caldwell decisions are not for application to their claims. Thomas Davis, B-189673, February 23, 1978.

The claimants also believe that they are entitled to retroactive promotions by the determination of the Assistant Secretary of Labor that the SSA had committed a ULP by failing to meet and confer with the AFGE about the impact of the promotion moratorium and a possible change in position classification. Under the provisions of 5 U.S.C. § 5596 (1976) an employee may be granted a temporary promotion with backpay if it is found by appropriate authority that the withdrawal, reduction, or denial of all or part of the pay due an employee was the clear and direct result of an unjustified or unwarranted personnel action and would not have occurred but for such action. 5 C.F.R. § 550.803(a). In this case the Assistant Secretary found that the SSA had committed a ULP but he did not determine that the claimants were denied all or part of the pay due them. Therefore, the determination of the Assistant Secretary does not entitle the claimants to retroactive promotions with backpay. See 54 Comp. Gen. 760 (1975).

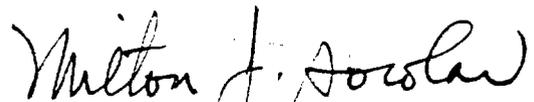
In 1977 the SSA froze the promotions of analysts to GS-13 because of problems concerning the validity of the classification of work at that level. The record indicates that there were classification audits of the analyst positions and that the SSA updated the position description and classified the position of an analyst, Marvin A. Cannon, Jr., at GS-13 in May 1978. Mr. Cannon appealed the classification and sought a grade level change to GS-14. On December 28, 1978, the Civil Service Commission decided that Mr. Cannon's position was properly classified at GS-13. The SSA does not now dispute the existence of GS-13 work in the claimant's organization. However, it argues that it is within the agency's prerogative and responsibility to determine the number of positions at a certain level. For its authority it cites 5 U.S.C. § 302, chapter 312 of the Federal Personnel Manual and Office of Management

B-196216, B-196222 to 224
B-196228 to 234
B-196247 to 250, B-196264

and Budget Circular A-64, as revised. We agree that the SSA has the authority to determine the number of positions in a given grade level. In view of this, the mere existence of positions at the GS-13 grade level does not entitle the claimants to be promoted to such positions.

In summary the claimants are not entitled to retroactive promotions with backpay since the SSA had discretion as to the time of promotion under the career-ladder, the ULP decision did not direct any retroactive promotions, and the mere existence of a higher-grade position does not entitle an employee to such position.

The appeal also asks that we consider sending the claim to the Court of Appeals in accordance with 28 U.S.C. § 2510. Our Office has considered transmittal of a claim under that section as discretionary. In practice we have applied its application in only two situations: 1. Where there are two or more claimants to a monetary amount which has been determined to be due and the Government is only a stakeholder; and 2. Where the rights of the claimant are definite, but the amount due is too uncertain to permit settlement by our Office. B-176997, March 27, 1973. Since neither situation is present here, we shall not forward the claims to the Court of Claims.



Acting Comptroller General
of the United States